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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 67

JOHN W. TERRY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, AS AMICUS CURIAE.

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Interest of the Amicus Curiae.

Americans for Effective Law Enforcement is a non-partisan, non-political, not-for-profit organization, incorporated under the laws of the State of Illinois in 1966. It has also been declared a tax-exempt, educational corporation by the United States Treasury Department.

Although generally concerned with the problems of crime and the effective administration of criminal justice in America, a specific objective of AELE is participation in significant cases, in this and other courts, which will, by their holdings, profoundly affect not only the rights of individual defendants confronted by the processes of the law, but also the right of all our citizens to "secure for themselves the domestic tranquility and justice that has been

guaranteed in the Preamble to The Constitution of the United States.'"[1]

Like another *amicus* in this case,[2] AELE is concerned about persons beyond the litigants, and about issues beyond those immediately raised by the litigants' briefs.

Without derogating the concern of another *amicus* for the innocent citizens who are subjected to field interrogations—and especially those who have been the victims of *abusive* field interrogations—it needs to be made clear that there are other Americans, by far the majority, who have an interest in seeing that *reasonable,* non-abusive police procedures which prevent crime and catch criminals are sustained by the courts.

AELE's deep rooted interest on behalf of the citizenry at large is embodied in recent statements appearing in the President's Crime Commission Report:

> "There is much crime in America, more than ever is reported, far more than ever is solved, far too much for the health of the nation. Every American knows that. Every American is, in a sense, a victim of crime. Violence and theft have not only injured, often irreparably, hundreds of thousands of citizens, but have directly affected everyone."
>
> ". . . the fear of crimes of violence is not a simple fear of injury, or death or even of all crimes of violence, but, at bottom, a fear of strangers. * * * This fear of strangers has greatly impoverished the lives of many Americans, especially those who live in high-crime neighborhoods in large cities. People stay behind the locked doors of their homes rather than risk walking in the streets at night. Poor people spend money on taxis because they are afraid to walk or use public transportation. Sociable people are afraid to talk to those they do not know. In short, society is to an in-

1. Preamble to the By-Laws of Americans For Effective Law Enforcement, Inc., 2.

2. The NAACP Legal Defense and Educational Fund, Inc.

creasing extent suffering from what economists call 'opportunity costs' as the result of fear of crime. * * * When many persons stay home, they are not availing themselves of the opportunities offered in their communities, and they are not visiting their friends as frequently as they might. The general level of social interaction in the society is reduced.

When fear of crime becomes fear of the stranger the social order is further damaged. As the level of sociability and mutual trust is reduced, streets and public places can indeed become more dangerous. Not only will there be fewer people abroad but those who are abroad will manifest a fear of and a lack of concern for each other. The reported incidents of bystanders indifferent to cries for help are the logical consequence of a reduced sociability, mutual distrust, and withdrawal.

However, the most dangerous aspect of a fear of strangers is its implication that the moral and social order of society are of doubtful trustworthiness and stability. Everyone is dependent on this order to instill in all members of society a respect for the persons and possessions of others. When it appears that there are more and more people who do not have this respect, the security that comes from living in an orderly and trustworthy society is undermined. The tendency of many people to think of crime in terms of increasing moral deterioration is an indication that they are losing their faith in their society. And so the costs of the fear of crime to the social order may ultimately be even greater than its psychological costs to individuals."[3]

We have set forth these apprehensions of the American people at length because we believe they vitally relate to the questions involved in this case. We believe that if field interrogation, or "stop and frisk" as it is most commonly (and sometimes most inappropriately) called is found to be

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3. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 1, 52 (hereinafter cited as COMMISSION REPORT).

at odds with the Constitution, the ability of the police to prevent crime and catch criminals will be sharply constrained. And the consequent physical and social impoverishment of our people will, tragically, increase.[4]

Apart from the desire of AELE to give voice to the American public concerned about crime and its consequences, we believe that it is important to also express what we think are the views of the law enforcement profession as a whole, unrestricted by the needs or desires to uphold a particular decision or to sustain a particular arrest or search. This position can be assumed by an *amicus* whereas it may not be available to a litigant. The importance of our stating these views is obvious in the light of the following considerations:

> "... many ... decisions [are] made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. If judges are to balance accurately law enforcement needs against human rights, the former must be articulated. They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely exclusively on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire nation."[5]

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4. "In society's day-to-day efforts to protect its citizens from the suffering, fear, and property loss produced by crime and the threat of crime, the policeman occupies the front line. It is he who directly confronts criminal situations, and it is to him that the public looks for personal safety. The freedom of Americans to walk their streets and be secure in their homes—in fact, to do what they want when they want—depends to a great extent on their policemen." COMMISSION REPORT 92.

5. COMMISSION REPORT 94.

Finally, we ask that the arguments which follow be judged in the light of the stated policy of AELE to support equal justice and equal treatment *for all.*[6]

The consents of the parties to our appearance as *amicus* in this case have been filed with the Clerk of this Court.

6. "In pursuing its objectives, AELE will adhere to the fundamental principles of justice and equal protection for all irrespective of color, creed, religion, social status or other individual or group characteristics. It emphatically rejects the support of, and will not support any individual, group, or activity that advocates racial bias or other unconstitutional concepts." By-Laws of Americans for Effective Law Enforcement 2.

ARGUMENT.

"To question all things . . . above all, to insist upon having the meaning of a word clearly understood before using it, and the meaning of a proposition before assenting to it. . . ."[7]

I.

WHAT STOP AND FRISK IS—AND WHAT IT IS NOT.

The law enforcement process which we ask this Court to sustain in the "stop and frisk" cases under consideration is simply this: A police officer may detain pedestrians or motorists in public places, and question them as to their identity and purpose in the particular location, when under the circumstances, such detention and questioning seems appropriate to a prudent police officer—one mindful of his responsibility "to prevent crime and catch criminals"[8]—because reasonable suspicion of criminality has been aroused, although there is not yet probable cause to believe that a crime has been, or is being, committed. Whether such police conduct violates the Fourth Amendment is the core of these cases. We believe that it does not.

All other issues in the cases are subsidiary. One, however, should be mentioned at this point, and it is of considerable importance: If the above described police conduct is constitutional, as we believe it is, the officer involved

7. From the inaugural address of John Stuart Mill as Rector, University of St. Andrews, February 1, 1867.

8. The phrase of Mr. Justice Schaefer for the Supreme Court of Illinois in *People* v. *Watkins*, 19 Ill. 2d 11, 19, 166 N. E. 2d 433, 437 (1960).

must have the power to act reasonably to protect himself from attack, or to prevent the suspect's escape, during the course of the detention and inquiry. Whether such power implicates only a "frisk", or authorizes a "search", is a question to which we shall return later.

One of the problems, of course, in pursuing a rational discussion of field interrogation is to be rid of the tyranny of labels to which the discussion about "stop and frisk" has been subjected in recent years by lawyers as well as laymen. Whether the process is known as "stop and frisk", "stop and question", "street stop", or "field interrogation", is not only unimportant, but misleading as well.

The power which we ask this Court to sustain will not receive appropriate analysis if the analysis proceeds upon the assumption, usually colored by emotional reaction to the phrase, that "stop" means an arbitrary selection of subjects and that "frisk" automatically follows a stop. On the other hand, we make no claim that arbitrary police action is any the less so because concealed behind the more neutral sounding facade of "field interrogation". We cannot, at this juncture, afford to get "hung up" on the name.

For this confusion law enforcement must share at least part, or perhaps most, of the blame. Traditionally, the term "field interrogation," has been used to describe a mixed bag of police techniques in aid of the patrol process, some of which are constitutional and some not.

> "A field interrogation is, in some circumstances, difficult to distinguish from an arrest and subsequent street questioning before the arrested person is taken to the station. In other circumstances, a field interrogation may be difficult to distinguish from crime-preventive street practices which have an objective other than arrest and prosecution of suspects. This is true, for

example, with respect to a street confrontation program designed to discover and confiscate knives, guns, and other weapons. Despite the difficulty in some situations of clearly distinguishing field interrogation from arrest, on the one hand, or from police on-the-street preventive practices, on the other, *observation of current police practice does disclose that field interrogation is an isolable police practice which has independent operational significance.*"[9]

We also believe that the kind of field interrogation described in our definition is an isolable police practice that can be sustained as constitutional. Whatever value the police attach to concomitant aspects of patrol as crime repression measures, however, cannot obscure the fact that their use is subject to serious constitutional question. What is important is the necessity, for present purposes, that the impermissible patrol practices be clearly identified and put to one side.

A current commentary on police patrol practices identifies at least three other techniques which may, in some instances, resemble the police field interrogation power for which we contend. These are: (1) the practice of regularly, and without particular cause, interrogating, searching, and sometimes arresting, known vice offenders;[10] (2) the practice of routine searches of males, particularly young males, in high crime areas, to discover and confiscate weapons;[11] and (3) the searching and dispersal from the streets of congregating members of teen-age gangs.[12]

All of these techniques, stated abstractedly, may be, and probably are, violative of the Fourth Amendment. We would not ask this Court to approve them, efficacious as they

9. TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME 9 (1967) (hereinafter cited as DETECTION) (Emphasis added.)

10. DETECTION 11-12.

11. DETECTION 13.

12. DETECTION 13-14.

may be as crime prevention measures. The point we make is that they can be distinguished, and must be distinguished, from the practice of stopping *particular* persons, found in *particular* circumstances which indicate past, occurring, or potential criminal conduct, for the purpose of questioning —in some cases, followed, or even preceded, by the protective device of frisk or search for weapons. We reject absolutely the position of the other *amicus,*[13] and some of the commentators,[14] that this Court must also sustain these practices if our position be adopted.

The kind of constitutional field interrogation which can be isolated from other practices is illustrated by two cases: *Terry* v. *Ohio,* in which we appear as *amicus,* and *State* v. *Dilley,* 40 N. J. 460, 231 A. 2d 353 (1967), a recent decision of the Supreme Court of New Jersey.

In *Terry,* a detective with thirty-nine years of experience observed two men on a street corner in downtown Cleveland. For a period of ten to twelve minutes, he watched them as first one, then the other, repeatedly walked down the street, peered into the window of a jewelry store or an airline office, and then returned to converse. Shortly they were joined by a third man. A conversation ensued and the third man then departed. Thereafter, the original two walked several hundred feet down the street and again engaged in conversation with the third man. At this point, the detective, whose suspicions had been thus aroused, approached the three men, identified himself as a police officer and asked for their names. When he received only a mumbled reply, he turned one man around and patted down the outside of his clothing. This frisk revealed a hard

13. *Cf.* Brief for the NAACP as *Amicus Curiae* 45.

14. Schwartz, *Stop And Frisk: A Case Study in Judicial Control of the Police,* 58 J. CRIM. L., C. & P. S. 433, 443-44 (1967). *But see* Pilcher, *The Law and Practice of Field Interrogation,* 58 J. CRIM. L., C. & P. S. 465, 469 (1967); Younger, *Stop and Frisk: "Say It Like It Is",* 58 J. CRIM. L., C. & P. S. 293, 295 (1967).

object which, upon seizure, turned out to be a revolver. All three men were then ordered into a store and told to face the wall. A frisk of the second man disclosed another revolver. A frisk of the third man disclosed nothing.

The record is clear in *Terry* concerning the purposes for which the original stop and subsequent frisk were made. The officer testified that he approached the defendants to question them because "he suspected them of casing a job, a stick-up". When he received only a mumbled reply, he frisked them because "I felt as though they were going to pull a stick-up and they may have a gun".[15] In this case, therefore, there is no question about the motives of the officer. He was not engaged in an arbitrary or random stopping of persons on the street. He was not engaged in suppression of vice activities by the seizures of known vice offenders. He was not concerned with "getting the weapons off the street" of an urban ghetto. He was not seeking to establish his authority over the "turf" sought to be ruled by teen-age gang members. He was not seeking to ferret out contraband. He was investigating particular persons found in particular circumstances which indicated to him, as a reasonable and experienced police officer, that a crime might be about to occur, and he was doing it in a manner entirely, and purposefully, concerned with his own safety.

It may be argued that the conduct deemed suspicious by the officer in *Terry* could just as well have been innocent. The men could have been waiting for someone on the street corner. Another companion could have been making a purchase in the jewelry store and a display in the window of the airline office could have caught the eye of his friends waiting outside. The conversation with the third man might have been on some subject irrelevant to their im-

15. *State* v. *Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114, 120 (Ct. App. 1966).

mediate purpose. But even in cases involving probable cause for arrest, it has never been held that the conduct of the defendants under examination must be entirely consistent with guilt and utterly inconsistent with innocence. Such a holding, indeed, would destroy the concept of probable cause as a viable standard.

An even stronger case is presented by *Dilley*. Here a veteran member of the New Brunswick police department was patrolling a high crime area in a police car at 3:00 A. M. "He knew the area very well, having been born and brought up there, and he described it in detail. He had worked in the area as a police officer for fifteen years, knew the people there and both Dilley and Brinkley [a co-defendant] were strangers to him." As the two men were walking down the street, "they kept turning their heads every few steps looking to the rear". "He drove on, making a series of turns, until he observed the men standing between two automobiles in a municipal parking lot. As he pulled into the lot, the men turned and walked back to the street. He followed and called to them to stop. He got out of his car, asked them what they were doing there and they replied 'nothing'. He told them they were under arrest and he gave the defendant Dilley 'a quick frisk' by patting him on the right side of his ski jacket. He felt a gun in Dilley's pocket and removed it. It was a loaded .38 caliber revolver. The other man . . . was also found to be armed."[16]

Reasonable men might well differ on whether the officer had probable cause for arrest when he stopped the men and frisked them, and, in fact, the Supreme Court of New Jersey declined to so hold. But reasonable men cannot differ, we believe, on whether there was, at that time, a reasonable suspicion of criminality which justified the officer in detaining the men for the purposes of further in-

16. *State* v. *Dilley*, 40 N. J. 460, 231 A. 2d 353, 354 (1967).

quiry. It is also important to note that the officer did not stop the men simply because they were walking down the street of a high-crime, low-income neighborhood at 3:00 A. M. and were unknown to him, nor did he stop them because they were standing between two parked cars. He stopped them only after they walked away from the lot as he pulled in, and he frisked them only after they gave an answer to his question which ascribed no reasonable purpose to their conduct.

In sanctioning what the officer did in *Dilley*, the Supreme Court of New Jersey did not, therefore, subject persons roaming the streets of the ghetto late at night to random or arbitrary stops and searches simply because of such behavior. People are entitled, we suppose, to walk the streets of a city at 3:00 A. M. with no purpose in mind. This right, however, does not immunize them from reasonable police inquiry when such conduct, considered in light of other circumstances, renders it reasonable for the police to inquire into possible criminality. The fact that innocent men may also walk the streets late at night does not immunize *all* who do so under *all* circumstances.

Here again, as was the case with *Terry*, no improper motive for the frisk can be imputed, on this record, to the officer. As the Supreme Court of New Jersey found, "When he frisked Dilley he did it for self-protection. He described his action as 'common police procedure' in accordance with formal instructions he had received in both federal and state police schools. He stressed that he was alone when he confronted the two men, that he did not know 'what they were carrying' and that it was 'very well possible' he could have been 'killed by one of them.' "[17]

We repeat that the police conduct involved in *Terry* and *Dilley* is the kind of conduct which can rightly be called

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17. 231 A. 2d at 354.

proper field interrogation. It may be separated, in the minds of the police and in the opinions of the courts, from related, but clearly distinguishable, field procedures which have as their purpose the suppression of vice, the confiscation of weapons, or the establishment of police "authority" over the streets in high-crime areas. More importantly, it may be sustained as constitutional without licensing either its abuse or the other practices of repression.

It cannot be denied that stopping persons on the street for questioning which involves detention against the will and, in some cases, a concurrent or subsequent frisk or search, is conduct subject to the commands of the Fourth Amendment. If the standard by which such conduct is to be judged, therefore, is the *same* standard of probable cause traditionally required for arrest, we concede that such conduct is, under the prior opinions of this Court, unconstitutional. But we believe that such an inflexible application of traditional probable cause to this conduct would be at odds with the whole spirit of the Fourth Amendment; that there may be a concept of *variable* probable cause which applies to pre-arrest investigatory procedures such as field interrogation, and that the true test is the *balancing* of the degree of interference with personal liberty against the information possessed by the officer which impelled him to act. This argument, and others, can best be made in response to specific issues raised by the brief for the NAACP Legal Defense And Educational Fund, Inc., as *amicus curiae*, and we turn, therefore, to a consideration of some of their arguments.

II.

THE POSITION OF THE OPPONENTS OF STOP AND FRISK.

(1) *"The evidence is weighty and uncontradicted, that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged."*[18]

We are somewhat at a loss to appreciate the force of this argument in the Brief of the NAACP. It could as well be said that the *arrest* power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities, and the underprivileged. Are the arrest statutes to be struck down on this account? Those who deal intimately with the day-to-day process of criminal justice in this country can testify that the entire machinery of the criminal law ensnares the poor more often than the wealthy, and this will continue to be true so long as poverty, lack of education, and lack of employment opportunities persist as causative crime factors. In many cities, minority group defendants compose a disproportionate share of the cases on the dockets of our criminal courts. Are they therefore immune from prosecution, conviction and punishment? May only the affluent, suburbanite members of a racial majority group be called to account for their crimes?

Perhaps the *amicus* means more than this. Perhaps the implication is that the stop and frisk power is *wrongfully*, and by evil design, employed by the police most frequently against the inhabitants of our inner cities, racial minorities, and the underprivileged.[19] If that is the argument, AELE rejects the claim that the evidence is "weighty and uncontradicted".

The President's Commission on Law Enforcement and

18. Brief for the NAACP 3.

19. *See* Brief for the NAACP 45, n. 79.

Administration of Justice had this to say with respect to the behavior of the police toward minority groups:

> "Commission observers watched policemen work in minority-group neighborhoods in a number of major cities, and the commission has studied the findings of those who have made observations in many other cities. These observations indicate that any generalization about how 'policemen' treat 'minority-group members', or vice versa, is almost sure to be misleading. For example, one commission study conducted in a few cities showed that most policemen treat minority-group citizens in a nondiscriminatory manner, and received at least as much cooperation and courtesy from Negroes as from whites."[20]

Following are statements that appear in the reports submitted to the Commission:

> "All citizens were asked about their views whether the police should have the right to stop them and question or search them. A substantial majority of the citizens believe that the police should at least under some conditions be able to stop and ask them their names and addresses (79 percent); an absolute majority of 56 per cent sets no conditions for stopping and asking them to identify themselves. In Boston there are no differences between Negroes and whites with almost 6 of 10 citizens saying they would not object to the police asking them to stop and identify themselves by name and address under any conditions."[21] * * *
>
> "Assuming that police discretion is greater in the on-view encounter, it could also be assumed that officers will exercise that discretion more often with Negroes than whites (whether on grounds of a higher crime rate for Negroes than whites in these cities or on

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20. COMMISSION REPORT 99-100.

21. 1 STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS (Field Surveys III) 87 (Report of a Research Study Submitted to the President's Commission on Law Enforcement and Administration of Justice, 1967).

grounds of discrimination, or some other basis). Correlatively, aggravated assaults and other kinds of violence are more commonly observed for Negroes than whites in dispatched encounters in these cities so that the officer more likely would need to search Negroes than whites for his own protection in dispatched encounters. * * * *Personal searches conducted on Negroes are over twice as productive of weapons as are those conducted on whites.*

"In on-view situations one-in-five frisks of a Negro yielded a gun; for whites the proportion was one-in-ten. * * * *In both types of mobilization [dispatched and on-view] the police more frequently conduct personal searches on Negroes than on whites; Negroes object less often, but they are more likely to be carrying weapons than whites.* * * * It is problematic whether police officers *cognitively* as well as *behaviorally* search those citizens upon whom their searches are most likely to be successful. The observations do not allow for inferences about police motivations. This 'attempt-success ratio' is clear as a behavioral phenomenon, nevertheless."[22]

In any event, if the police more often exercise the power of stop and frisk against inner city residents, the poor, and the minority groups because *all* the forces of the criminal process operate more often against such persons, it follows that when the police wrongfully use such power—whether by design or mistake—they will do so against the same people. What does not follow, however, is the conclusion that the *proper* exercise of such power should therefore be declared unconstitutional.

(2) "*. . . the Court is now asked for the first time to legitimate criminal investigative activity that significantly intrudes upon the privacy of individuals who are undif-*

22. 2 STUDIES IN CRIME AND LAW ENFORCEMENT, 85-88 *supra* n. 21 (Emphasis in original.)

23. Brief for the NAACP 10-11.

ferentiable from Everyman as the probable perpetrators of a crime."[23]

Other persons were walking the streets of Cleveland at the time of the encounter which led to the stop, frisk and arrest in the *Terry* case; they were not stopped, frisked, and arrested. The record in this case makes plain that there was conduct which reasonably differentiated Terry from "Everyman". The record in the *Dilley* case makes plain that there was conduct which reasonably differentiated Dilley and his companion from "Everyman".

The NAACP argument does not hold unless it is directed to the *arbitrary* conduct of police or to field investigative procedures which are aimed at weapons confiscation and are therefore directed against a large enough class to include, at least at that time and in that place, "Everyman". The answer is that we are not asking this Court to "legitimate" such "criminal investigative activity". We have already said that such conduct is unconstitutional.

(3) *"However intellectually reasonable Dean Barrett's balancing approach may be in the corridors of academe, it is a delusive and unworkable proposition on the streets of our cities, and particularly on the streets of our ghettos where stop-frisk logic does its daily work. Closely inspected, we believe, both the 'balancing' theory of Fourth Amendment rights and the Stop-Frisk Model that is built upon it show themselves to be mere fine, scholastic pretexts for oppression. The 'minor interference with personal liberty' that they sanction is a major interference; the protections which they promise are unreal illusions; the 'balance' scale which they purport to employ is invariably tipped by the police commissioner's thumb; and their consequence is nothing more or less than a police dictatorship of the streets.*"[24]

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24. Brief for the NAACP 34.

There are several things wrong with this argument.

First, the argument assumes that only those who have spent half their lives in squad cars, or perhaps all of their lives on the streets of the ghetto, are qualified to speak on the proper interpretation of the Fourth Amendment. Dean Barrett is obviously not. Confined as he is to "the corridors of academe", spinning out theories both "delusive and unworkable", it is not surprising that his arguments are viewed by some as only "fine scholastic pretexts for oppression" whose "consequence is nothing more or less than a police dictatorship of the streets".

If this attack were confined simply to Dean Barrett, perhaps one of the country's foremost commentators on the criminal law in general, and the Fourth Amendment in particular, it could be discounted, questions of taste aside. Alas, however, this Court also appears to have been taken in by Dean Barrett. For in the same article[25] in which he suggested the balancing approach to the question of Fourth Amendment application to pre-arrest investigatory procedures, Dean Barrett severely criticized both the rationales and consequences of this Court's holding in *Frank* v. *Maryland,* a case that has lately been overruled,[26] and precisely upon the grounds urged by him. But perhaps the "corridors of academe" are merely one-way streets.

Second, Dean Barrett's argument, which the NAACP characterizes as the "most articulate expression" of the balancing rationale, is not fully treated in the *amicus* brief. It deserves further explication here. Dean Barrett first set forth the kinds of police conduct under scrutiny:

> "Investigation is the process by which police are able to acquire that 'probable cause' which will justify the arrest and prosecution of a suspected offender. * * *

25. Barrett, *Personal Rights, Property Rights, And The Fourth Amendment,* SUP. CT. REV. 46, 72-74 (1960).

26. *Camara* v. *Municipal Court,* 387 U. S. 523 (1967).

> The process of investigation necessarily involves *varying degrees of interference* with the privacy of suspected offenders. 'Stakeouts' with the police watching a man's house, the tailing of suspects, the use of undercover agents, and similar investigative techniques result, obviously, in invasions of privacy which are offensive to the person involved. Stopping and questioning suspicious persons on the street involves a greater degree of restriction on personal liberty. * * *
>
> Yet if the general public interest in adequate law enforcement is to be served, it is clear that police must be given reasonably wide powers of investigation. Furthermore, if the goal is to protect individuals from the serious invasion of personal rights which results from formal arrests and charges of crime in the absence of clear showing of probable cause to believe that they have committed a crime, reasonable latitude must be given for investigative techniques of the kind just described. On the other hand, it is obvious that some restraint must be placed upon the police because *indiscriminate* use of these techniques could be unreasonably oppressive."[27]

He then described the difficulties encountered when on-street investigative conduct is held to be an interference with liberty in the traditional sense of an "arrest":

> In applying the Fourth Amendment to the investigative process the Court makes the issue turn upon traditional tort law concepts. * * * If he [the officer] restricts the liberty of movement of the suspect sufficiently to commit the tort of false imprisonment, he can justify his action only by demonstrating that he had probable cause to make a formal arrest. * * *
>
> The result of this all-or-nothing approach is to place too little restraint on some investigative techniques and too great restraint on others. It tends to defeat the fundamental objectives of the Fourth

27. *Barrett, supra* n. 25 at 57-58 (Emphasis added.)

> Amendment by attempting to establish the same protection against relatively minor violations of person and privacy as against the most serious ones. The problems here can be illustrated by a consideration of . . . . [*Henry* v. *United States*, 361 U. S. 98 (1959)] . . . ."[28]

Henry is the only case decided by this Court in which it may be said that the question of the propriety of a field interrogation on less than probable cause was considered. The facts of the case are simple. The FBI, in the process of investigating the theft of an interstate shipment of whiskey were told by an official of the trucking company that the defendant Pierotti was somehow "implicated" with interstate shipments. Thereafter Pierotti and the defendant Henry were seen leaving a tavern in the neighborhood where the theft occurred. They drove away together, and stopped in an alley in a residential neighborhood. Henry entered a residence and returned with cartons. The automobile then drove away and was lost by the surveilling agents. Sometime later the car was again seen near the tavern and the defendants' actions were repeated. As the car drove away from the residence a second time, loaded with more cartons, it was curbed by the agents. As Henry alighted from the car, he was heard to say to his companion "Hold it; it is the G's", and "Tell him you just picked me up". Looking into the car, the agents saw cartons with "interstate" labels. The defendant told the agents that the cartons were in the car when he and Pierotti had borrowed it, a statement the agents knew to be untrue.

In *Henry*, the government conceded that an arrest took place when the defendants' freedom of movement was interrupted, that is, when the FBI signaled the car to the

28. *Id.* at 58-59.

curb. Finding no probable cause for arrest at this point, a majority of this Court held the arrest to be unconstitutional.

Though the majority opinion in *Henry* simply holds that arrests cannot be made without probable cause, there is no explicit rejection of the proposition that investigative actions not amounting to arrest may be made on less than probable cause. Under these circumstances, it might well be argued that the government's concession foreclosed the majority's consideration of this issue. The dissent in *Henry* explicitly said that the officers possessed sufficient information at the time of the stop to warrant further pre-arrest investigation; that this investigation could take the form of a stop and detention for questioning; and that probable cause was not required for this action. Thereafter, the dissent argued, probable cause was found when the nature of the information received by the agents during the stop was added to what they knew before the stop was made. Mr. Justice Clark said:

> "The earlier events [prior to the stop] certainly disclosed ample grounds to justify the following of the car, *the subsequent stopping thereof, and the questioning of petitioner by the agents.*" [29]

In our view, therefore, the dissenting opinion in *Henry* is explicit authority for the proposition we advance in this case: that a police officer having reasonable suspicion of criminality may stop, detain, and question for the purpose of ascertaining whether probable cause may be found to support an arrest.

The NAACP, as *amicus*, contends that the government's concession concerning the time of the arrest was not the controlling factor in *Henry* since the opinion of the majority went on to say "That [the proposition that the arrest

29. 361 U. S. at 106.

took place at the stop] is *our* view on the facts of this particular case.'"[30] If, indeed, this Court held in *Henry* that an arrest requiring probable cause took place at the time the FBI stopped the car, then, of course, *Henry* is authority contrary to our position in this case. If that be so, we request that *Henry* now be reconsidered and overruled.

The view that *Henry* stands for the proposition that pre-arrest field detention cannot be made on less than probable cause is also hard to reconcile with the Court's subsequent disposition of *Rios* v. *United States*.[31] There the government specifically argued that "the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission". This argument was not challenged by the Court's opinion; in fact the Court seemed to say that if the narcotics had been exposed during such a period "a lawful arrest could then have been supported by their reasonable cause to believe that a felony was being committed in their presence".[32] The case was then remanded for factual findings on when the arrest occurred. If *Henry* was decided, not upon the government's concession, but upon the Court's view of the facts, it follows that the Court would have held that the arrest in *Rios* took place when the police approached the taxi with the intention of detaining the defendant for the purposes of interrogation and there would have been no need for a remand.

In any event, the authority of *Henry* as support for the argument that field interrogation without probable cause violates the Fourth Amendment is persuasively diminished, we believe, by Dean Barrett's conclusions, which we adopt:

30. 361 U. S. at 103 (Emphasis added.)
31. 364 U. S. 253 (1960).
32. 364 U. S. at 262.

"The question may be asked whether it is wise to resolve problems of the type presented in *Henry* and *Rios* in terms of tort law-concepts. * * * Would not the policy of the Fourth Amendment be better served by an approach which determines the reasonableness of each investigative technique by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved?

If one looks at the problem in these terms, it becomes rational to argue that in *Henry* the police did have sufficient grounds for suspicion to justify the relatively minor interference with the personal liberty and property rights of Henry and Pierotti which was involved in stopping their car, questioning them, and looking through the open car door. In fact, did not the police act in a way which properly balanced the policies of the Fourth Amendment against the practical consequences to the suspected individuals?"[33]

We believe that the recent opinion of this Court in *Camara* v. *Municipal Court*[34] also supports the validity of the argument that governmental intrusion into areas of privacy may be measured in terms of degrees and that the application of the Fourth Amendment in response to such intrusions is not inflexible. In *Camara,* the Court agreed "that a routine inspection of the physical condition of private property is a less hostile instrusion than the typical policeman's search for the fruits and instrumentalities of crime".[35]

What is the essential difference between that view and a recognition that detention for field interrogation purposes involves "a less hostile intrusion" than an arrest which leads to custody and the preferment of charges? We submit there is none.

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33. *Barrett, supra* n. 25 at 64.
34. 387 U. S. 523 (1967).
35. 387 U. S. at 530.

The *Camara* opinion then goes on to say that even the administrative search involved there was governed by Fourth Amendment standards and that an individual's rights under such a search were not merely "peripheral" to the "Fourth Amendment interests at stake".[36] But we are willing to make the very same concession here. There is no doubt that pre-arrest field detention for interrogation is conduct which is subject to regulation under the Fourth Amendment and that when based on grounds less than reasonable suspicion of criminality is unconstitutional.

Finally, the holding in *Camara*—that probable cause for the issuance of a warrant may be found on grounds less than those traditionally applied in Fourth Amendment cases—demonstrates conclusively, we believe, that this Court is willing to fashion rules which refuse to strait-jacket Fourth Amendment responses to differing degrees of governmental intrusions on privacy.

Essentially, the NAACP derides the balancing approach because it believes that "reasonable suspicion" cannot be defined. They say:

> "But as to what citizen is it not reasonably possible that he has committed some crime? As to what unknown citizen on the street (even a crowded street) near the scene of a known crime? As to what group of ill-dressed young men on a ghetto street corner? As to what Negro abroad on the streets in a 'white' neighborhood late in the day? Surely, it is reasonably possible that each of these has committed a crime (or is about to commit one, as the New York statute and common *Stop-Frisk* logic provide)."[37]

The answer is, that without more, to *none* of them. It is not reasonably possible (in the sense that we, and all the courts which have upheld field detention, use the phrase

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36. *Id.*

37. Brief for the NAACP 39-40. See also 45.

"reasonable suspicion") to believe that anyone in these categories has committed a crime and so is subject to detention. If the examples recited above contain all the information known to the officer, he is not authorized, under the Fourth Amendment, to detain for interrogation. In effect, the *amicus* has constructed *his* examples of "reasonable suspicion", and then, arguing their invalidity, has concluded that *our* definition is unworkable and unconstitutional. Since we emphatically reject his premise, we reject also his conclusion.

(4) *"The courts have not in fact imposed any limitations or restrictions upon the stop and frisk power once that power is granted. They have not done so because they could not do so—because the essence of the doctrine of stop and frisk on less than probable cause is judicial abdication to police judgment."*[38]

There are several answers to this argument. First, those courts which have upheld stop and frisk in cases we believe to have been rightly decided (*Terry* and *Dilley*) have not demonstrated "judicial abdication to police judgement". Second, there exist numerous cases where state courts of review, in construing traditional Fourth Amendment rules, have, in the judgment of this Court, erred and have been corrected. If there are cases dealing with stop and frisk which have been wrongly decided, explication of the proper principles governing the disposition of the cases now before the Court will serve to mark out standards in later cases. It would hardly be surprising to find a few improper dispositions in an area of the law which, to date, contains no precedential opinion of this Court. What is surprising is the implicit assumption of the *amicus* that, thereafter, the state trial and appellate courts would continue to sustain field interrogation cases on less than reasonable grounds.

38. Brief for the NAACP 47.

Nothing in the history of Fourth Amendment law warrants this conclusion.

(5) *Courts cannot control the "frisk" or "search" power since they "cannot be faulted for believing that an officer may always 'reasonably suspect' he is in danger. That is the nature of reasonable suspicion."*[39]

We can conceive of no reason why a decision whether an officer rightfully frisked or searched following a detention should be any harder to make than the decision whether an officer rightfully frisked or searched following an arrest. Since the standard is the same in both cases—a reasonable need to protect the life of the officer or to prevent escape—why should there be any difficulty in applying uniform rules? Moreover, frisk or search will no more automatically follow detention in every case than does frisk or search automatically follow arrest in every case. The experience of prior cases demonstrates that the courts have had no difficulty in concluding that every police custody does not call for a search incident to arrest even though the arrest is made on probable cause. A reference to representative opinions in which state courts of review have refused to authorize blanket incidental searches, even for weapons, in traffic arrests will illustrate the point.[40]

AELE does not adhere to the view that since a *search* can be made only incident to an arrest on probable cause, only a *frisk* may be made incident to a detention on reasonable suspicion. The nature of the initial interference with liberty is irrelevant to the kind of action which may be taken by the officer for his own protection. Some detentions may be more dangerous than arrests. Others will present less risk to the officer. In both arrest and detention cases, the proper question, in our view, is whether the action taken

39. Brief for the NAACP 51-52.

40. *See* SCHAEFER, THE SUSPECT AND SOCIETY 42 (1967).

by the officer was reasonably necessary for his own protection.[41] Whether a search, frisk, or no action at all is proper is a question to be determined by the facts of each case. Under this standard the actions taken by the officers in *Terry* and *Dilley*, for example, were reasonable in light of the position in which they found themselves and should be upheld.

(6) *"... we anticipate that the States of New York and Ohio will make the familiar inflated claims for stop and frisk as tools of law and order. If they do, let there be no mistake about this call to practicality. Whatever its conveniences and benefits to a narrow view of law-enforcement, stop and frisk carries with it an intense danger of inciting destructive community conflict."*[42]

Essentially, what the *amicus* is saying is that since the stop and frisk practice presents a danger of police-citizen conflict, it ought to be outlawed because the consequent deterioration of police-community relations will erode rather than strengthen law enforcement.

If only field interrogation under *reasonable* circumstances is authorized by the court as constitutionally permissible, it makes no sense to say that the practice must be abandoned because it will exacerbate police-citizen relations in the ghetto. Under some conditions even *proper* use of such law enforcement powers like arrest, search, indictment and prosecution will strain relations between society and persons subjected to those powers.[43]

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41. Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L., C. & P. S. 465, 479-84 (1967); Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L., C. & P. S. 532, 538 (1967).

42. Brief for the NAACP 68.

43. "It is not possible for the police to enforce the law and preserve the peace without incurring some hostility and resentment. This is inherent in the very nature of police work." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 178.

Even assuming that field interrogation procedures may endanger the effectiveness of law enforcement because of the hostility created in the ghetto, the decision whether the cost outweighs the gain is one for the states to make—either by action of the legislature in restricting police powers or by administrative action of the police themselves. It is not a decision for this Court. It has nothing to do with the question of whether stop and frisk is constitutional.[44]

Carried to its logical end, the *amicus* argument would compel the abolition of all law enforcement techniques which create police-community hostility. We suppose that many of the ghetto residents who rebel at the notion of stop and frisk being practiced in their community would object to even the very *presence* of police in their community—especially in the numbers suggested by *amicus* as an alternative to detention.

The police could, of course, withdraw from the ghetto and end all police-citizen conflicts. This alternative might be somewhat tolerable, if only criminals lived in the ghetto; at least *their* interferences with human liberty in the form of murder, robbery, rape and other crimes, would be practised only upon each other. But others live in the ghetto as well—innocent, law-abiding American citizens; by far the overwhelming majority. They are entitled, under the same Constitution which the *amicus* says compels the rejection of stop and frisk, to live their lives, and experience the safety of their homes and their streets without fear of criminal marauders. They have suffered enough—discrimination, poverty, lack of education, appalling conditions of

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44. "In order to balance the need for field interrogations and the harmful effect on police-community relations which may result from their *indiscriminate* use, State legislatures should define the extent of police authority to stop and question persons, and police departments should adopt detailed policies governing this authority whether or not legislation exists." TASK FORCE REPORT: THE POLICE *supra* note 43 at 185 (Emphasis added.)

housing, and community alienation. Must they also be deprived of their right to the protection of the law as well?

Conclusion.

Despite the evidence which has been found of cases in which *some* police have abused field interrogation in *some* instances—evidence upon which the *amicus* relies so heavily —the President's Commission on Law Enforcement and Administration of Justice unanimously recommends its adoption and use:

> "'The Commission believes that there is a definite need to authorize the police to stop suspects and possible witnesses of major crimes, to detain them for brief questioning if they will not voluntarily cooperate, and to search such suspects for dangerous weapons when such precaution is necessary.'"[45]

Amicus Curiae requests that the judgment in *Terry* v. *Ohio* be affirmed.

Respectfully submitted,

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45. TASK FORCE REPORT: THE POLICE, *supra* note 43 at 184. *See also* COMMISSION REPORT 94-95.